

## Federal Trade Commission

## § 240.8

### § 240.5 Definition of competing customers.

*Competing customers* are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

*Example 1:* Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three competing retailers that sell only in the Roanoke, Virginia area. Manufacturer A has no other customers selling in Roanoke or its vicinity. If Manufacturer A offers its promotion to one Roanoke customer, it should include all three, but it can limit the promotion to them. The trade area should be drawn to include retailers who compete.

*Example 2:* A national seller has direct-buying retailing customers reselling exclusively within the Baltimore area, and other customers within the area purchasing through wholesalers. The seller may lawfully engage in a promotional campaign confined to the Baltimore area, provided that it affords all of its retailing customers within the area the opportunity to participate, including those that purchase through wholesalers.

*Example 3:* B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store. If these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made available on proportionally equal terms to the discount department store.

### § 240.6 Interstate commerce.

The term "interstate commerce" has not been precisely defined in the statute. In general, if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials), the business may be subject to sections 2(d) and 2(e) of the Act. (The commerce standard for sections 2(d) and (e) is at least as inclusive as the commerce standard for section 2(a).) Sales or promotional offers within the District of Columbia and most United States possessions are also covered by the Act.

### § 240.7 Services or facilities.

The terms "services" and "facilities" have not been exactly defined by the

statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples—the list is not exhaustive—of promotional services and facilities covered by sections 2(d) and (e):

Cooperative advertising;  
Handbills;  
Demonstrators and demonstrations;  
Catalogues;  
Cabinets;  
Displays;  
Prizes or merchandise for conducting promotional contests;  
Special packaging, or package sizes; and  
Online advertising.

*Example 1:* A seller offers a supermarket chain an allowance of \$500 per store to stock a new packaged food product and find space for it on the supermarket's shelves and a further allowance of \$300 per store for placement of the new product on prime display space, an aisle endcap. The \$500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the \$300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d).

*Example 2:* During the Halloween season, a seller of multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging. The primary purpose of the special packaging is to promote customers' resale of the candy bars. Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act.

*Example 3:* A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act.

### § 240.8 Need for a plan.

A seller who makes payments or furnishes services that come under the

## § 240.9

## 16 CFR Ch. I (1–1–16 Edition)

Act should do so according to a plan. If there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. What the plan should include is described in more detail in the remainder of these Guides. Briefly, the plan should make payments or services functionally available to all competing customers on proportionally equal terms. (See § 240.9 of this part.) Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan's offerings. The seller should inform competing customers of the plans available to them, in time for them to decide whether to participate. (See § 240.10 of this part.)

### § 240.9 Proportionally equal terms.

(a) Promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.

(b) When a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper or Internet advertising or handbills.

*Example 1:* A seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time.

*Example 2:* A seller may place in reserve for each customer a specified amount of money for each unit purchased, and use it to reim-

burse these customers for the cost of advertising the seller's product.

*Example 3:* A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first \$1,000 purchased per month, 2 percent of the second \$1,000 per month, and 3 percent of all over that.

*Example 4:* A seller should not identify or feature one or a few customers in its own advertising without making the same, or if impracticable, alternative services available on proportionally equal terms to customers competing with the identified customer or customers.

*Example 5:* A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.

*Example 6:* A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of \$1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the \$1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of \$2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.

*Example 7:* A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing \$100 to Buyer A, \$50 to Buyer B, and \$25 to Buyer C, to be used for the Buyers' expenditures on promotion.

### § 240.10 Availability to all competing customers.

(a) *Functional availability.* (1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate.